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NO.

Supreme Court, U.S.
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in the Supreme Court of the United States

RUSSELL LEON, as Personal Representative of the Estate of JORGE MORALES,

Petitioner,

vs.

JOAQUIN AVINO, as County Manager of Metropolitan Dade County, Florida, and RAYMUNDO BARRIOS, individually and as chairman of the Melrose Community Development Advisory Board,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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29 pp

QUESTION PRESENTED

WHETHER, IN PERFORMING ITS INDEPENDENT CONSTITUTIONAL FACT REVIEW OF A FIRST AMENDMENT CASE, AND ESPECIALLY IN PERFORMING ITS BALANCING TEST AFTER DETERMINING THAT THE SPEECH ADDRESSED MATTERS OF PUBLIC CONCERN, THE APPELLATE COURT, CONSISTENT WITH THE SEVENTH AMENDMENT, SHOULD BE ABLE TO DISREGARD FACTUAL FINDINGS NECESSARILY MADE BY A JURY IN IMPOSING PUNITIVE DAMAGES AND TO HOLD THAT THE INTERESTS OF THE STATE ENABLE A WRONGDOING PUBLIC OFFICIAL TO SECURE THE TRANSFER OF A CRITICAL GOVERNMENT EMPLOYEE?

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NO.

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RUSSELL LEON, as Personal Representative of the Estate of JORGE MORALES,

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JOAQUIN AVINO, as County Manager of Metropolitan Dade County, Florida, and RAYMUNDO BARRIOS, individually and as chairman of the Melrose Community Development Advisory Board,

Respondents.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 848 F.2d 1145 (1988). The opinion is reprinted in the Appendix.[1]

[1]This action initially was styled *Jorge Morales, Plaintiff, vs. Merritt Stierheim, as County Manager of Metropolitan Dade County, Florida, and Raymundo Barrios, individually and as chairman of the Melrose Community Development*

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on July 7, 1988. A petition for rehearing was filed July 26, 1988, which petition was denied September 6, 1988.

The jurisdiction of this Court is invoked under Title 28 U.S.C. s. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This is a case of an urban planner who was transferred involuntarily from his assignment because the chairman of the neighborhood advisory committee did not like accusations the

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Advisory Board, defendants. Mr. Morales died July 7, 1988 and Russell Leon, as personal representative of Mr. Morales's estate, is substituted. Joaquin Avino is substituted in for Merritt Stierheim in Stierheim's official position.

planner was making about how the chairman ran the project. A jury awarded the planner both compensatory and punitive damages, but the Court of Appeals for the Eleventh Circuit held that the nature of his comments tipped the *Pickering*[2] balance in favor of the defendants even though the speech in which the planner had engaged concerned public matters and was a substantial motivating factor in his transfer. App. 11-12.

Jorge Morales, on November 5, 1985 filed a complaint seeking, *inter alia,* damages concerning his job reassignment by the Metropolitan Dade County Office of Community and Economic Development (OCED) at the behest of Raymundo Barrios, a neighborhood advisory chairman whom Morales had publicly criticized. Morales named as defendants both Merritt Stierheim, individually and as county manager of Metropolitan Dade County and Raymundo Barrios, individually and as chairman of the Melrose Neighborhood Advisory Committee. Morales alleged the defendants had violated his First Amendment rights to free speech. The action was brought pursuant to 42 U.S.C. s. 1983. Jurisdiction was based upon 42 U.S.C. s. 1988 and 28 U.S.C. ss. 1331 and 1343 (a) (3) and (4).

The jury found both defendants[3] liable for compensatory damages in the amount of $20,000. Additionally, it held Barrios liable for $5,000 in punitive damages. The court on October 17, 1986 entered judgment against the defendants for damages.

The United State Court of Appeals for the Eleventh Circuit on July 7, 1988 rendered its opinion overturning the verdict. App. 1. The Circuit Court found that Morales' speech addressed matters of public concern. It additionally held that the jury findings "are amply supported by the evidence" that Morales' statements were substantial, motivating factors in his reassignment, and that Morales would not have been

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[2]*Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[3]The case against Stierheim went to the jury only against Steirheim in his official capacity.

reassigned in the absence of such statements. The Court of Appeals, however, determined that Morales' criticisms had undermined his working relationship with Barrios so as to tip the *Pickering* balance for the defendants.

REASONS FOR GRANTING CERTIORARI

THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION CONCERNING THE CONFLICT BETWEEN THE FIRST AND SEVENTH AMENDMENTS IN FREE SPEECH CASES.

THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION AS TO WHETHER A GOVERNMENT ACTOR ENGAGING IN WRONGDOING SHOULD BE ABLE, CONSISTENT WITH THE FIRST AMENDMENT, TO SECURE THE TRANSFER OF A CRITICAL EMPLOYEE ON THE GROUNDS OF HARMONY.

This case presents a new facet of the conflict between the First and Seventh Amendments that is inherent in appellate courts' need to conduct "an independent constitutional judgment on the facts of the case," *Jacobellis v. Ohio*, 378 U.S. 184, 190, 84 S.Ct. 176, 12 L.Ed.2d 793 (1964) in cases involving "alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated,'" *New York Times Co. v. Sullivan*, 576 U.S. 254, 285, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The conflict involved has been given sharper definition by the seeming contradiction in crucial footnotes in two opinions. In the earlier, *Connick v. Myers*, 461 U.S. 138, 150, n. 10, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) the Court reiterated the need for such independent fact review in applying the balancing test prescribed in *Pickering*. In the latter, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514, n.

31, 104 S.Ct. 1949, 80 L.ED. 502 (1984), the Court said, however, that such a review does not amount to a "'de novo' review."

This conflict requires a definitive interpretation by this Court as to what weight, if any, an appellate court should give to a jury verdict in applying the *Pickering* balance in a public-employee speech case.

The Court of Appeals held that Morales' accusations of impropriety against Barrios -- i.e., that Barrios sought to obtain kickbacks and political contributions, that Barrios had sabotaged a community development meeting by telling board members to stay away, and that Barrios falsely accused the government agency in charge of the redevelopment program of being tardy in implementing a specific project when the delay was actually Barrios' fault -- involved matters of public concern. App. 7-8. The Court of Appeals also noted that the jury's findings that Morales' statements were a substantial motivating factor in his reassignment were "amply supported by the evidence." App. 6, n. 2. The Court of Appeals went on to say, however, that

> This case, like all cases involving the *Pickering* balance turns upon particular facts and circumstances. We conclude here that Morales' statements so severely impeded his own effectiveness and the effectiveness of [the Office of Community and Economic Development] in the Melrose area that the governmental interest at stake in this case clearly outweighs Morales' speech interest.

App. 11

The Court of Appeals for the Eleventh Circuit takes independent constitutional fact review too far. The rationale behind such a broad review repeatedly has been stated to be the prevention of local government (or jury) proscription of

constitutionally protected behavior.[4] The tack seized by the Eleventh Circuit has turned that sword of persons seeking to exercise free speech into a second-chance shield for government actors unable to convince a jury of the righteousness of their positions. In the instant case, it went so far as to cast virtually as an innocent victim a neighborhood politician whose anti-First Amendment conduct the jury found so reprehensible as to sanction him with punitive damages. Such an appellate-court application of the *Pickering* balance effectively negates the Seventh Amendment in public-employee speech cases where, as in the case at bar, the motivation for the action against the employee is an issue.

To be sure, the Seventh Amendment's prohibition on an appellate court's reexamination of any fact tried by a jury does not preclude a federal court "from determining whether governing rules of federal law have been properly applied to the facts," *New York Times Co.*, 576 U.S. at 285, n. 26. Indeed, as acknowledged above, a federal appellate court is "compelled to examine for [itself] the statements in issue and the circumstances under which they (are) made," *Connick*, 461 U.S. at 150, quoting *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946) (brackets added; parenthesis in original).

The requirement that the appellate court independently review the facts, however, does not require the appellate court to disregard such factual findings as the jury necessarily made in the instant case to impose punitive damages.[5] Even while holding that the "clearly erroneous" standard of Federal Rule of Civil Procedure 52 (a) "does not prescribe the standard of

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[4]*See, e.g. Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 698, 9 L.ED.2d 697 (1963); *New York Times Co.*, 376 U.S. at 287; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 866, at 915-816, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982).

[5] Significantly, in *Bose* it was not necessary for this Court to reject the "purely factual findings of the District Court" in order to "hold as a matter of law that the record does not contain clear and convincing evidence" supporting liability under the actual malice standard of *New York Times* Co. 466 U.S. at 513. In the instant case, such a rejection was necessary for the Eleventh Circuit to hold as it did.

review to be applied in reviewing a determination of actual malice," *Bose*, 466 U.S. 514, this Court has stated that "[t]he independent review function is not equivalent to a 'de novo' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff." *Id.*, at n. 31.

The very purpose of the more searching appellate review of First Amendment cases is "to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression,'" *Bose*, 469 U.S. at 499, quoting *New York Times Co.*, not to give a second chance to political bullies whose reasons for firing a critic are rejected by a jury. The appellate court's decision in the case at bar turns the gun of independent constitutional fact review upon the one whom it is supposed to protect.

In the instant case, as can be plainly seen from even the opinion of the Court of Appeals, there was evidence in the record that counters the self-serving testimony of the head of OCED quoted by the panel, App. 5, to the effect that a careful, studied judgment had been reached to rotate Morales from Melrose for the good of the program. There is evidence from which the jury could conclude that an "enraged" Barrios simply had made good on his threat that Morales should "start looking for another job." App. 3. For the transfer was initiated by Barrios, who mobilized the other members of the neighborhood advisory board to sign a petition requesting Morales' removal, on the basis of which petition Morales' transfer was effectuated. App. 4.

The jury's verdict, and especially its imposition of punitive damages against Barrios, is inconsistent with the Court of Appeals' conclusion that Morales was the cause for the disruption of the redevelopment program in Melrose, and/or that Morales had made his remarks at the wrong time, in the wrong place and in the wrong manner. App. 9-11.

Finally, the holding of the Court of Appeals in the case at bar would permit a wrongdoing government actor, such as

Barrios, to secure the transfer of a critical employee through cynical manipulation of the *Pickering* balancing test. The more obstreperous the wrongdoer was, using the logic of the Court of Appeals, the more the mission of government would be disrupted and the more the transfer of the critic would be justified. The Court of Appeals gives ammunition to government wrongdoers to move out whistle blowers. This Court needs to address the issue through this case. Even if the county government should be given the benefit of the *Pickering* balancing, Barrios personally should not be so sheltered.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December, 1988

Appendix

APPENDIX
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APPENDIX A

Morales v. Stierheim
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APPENDIX A

Jorge MORALES, Plaintiff-Appellee,

v.

Merritt STIERHEIM, As County Manager of Metropolitan Dade County, Florida, and individually, and Raymundo Barrios, individually and as Chairman of the Melrose Community Development Advisory Board, Defendants-Appellants.

Jorge MORALES, Plaintiff-Appellee,

v.

Merritt STIERHEIM and Raymundo Barrios, Defendants-Appellants.

Nos. 86-5894, 87-5343.

United States Court of Appeals, Eleventh Circuit.

July 7, 1988.

John McInnis, Cynthia Johnson, Asst. County Attys., Miami, Fla, for defendants-appellants.

William R. Amlong, Amlong & Amlong, P.A. Ft. Lauderdale, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and ANDERSON, Circuit Judges, and BROWN, Senior Circuit Judge.

ANDERSON, Circuit Judge:

This is an appeal from the grant of a permanent injunction and an award of compensatory and punitive damages to plaintiff-appellee Jorge Morales under 42 U.S.C. s. 1983. The district court found that Morales' job reassignment violated his First Amendment right to free speech. The court reinstated Morales to his former position and enjoined defendant-appellant Merritt Stierheim, County Manager of Metropolitan Dade County, from reassigning Morales. The court also awarded punitive damages against defendant-appellant Raymundo Barrios, Chairman of the Melrose Community Development Advisory Board, and awarded compensatory damages against both defendants. Defendants-appellants, collectively referred to as "OCED,"[1] seek reversal on grounds that the statements by Morales which motivated his reassignment were not constitutionally protected, or alternatively that Morales' reassignment based on the statements did not infringe on his constitutionally protected interest in freedom of expression. For the reasons discussed below, we reverse.

I. BACKGROUND

Jorge Morales is a principal planner for the Metropolitan Dade County Office of Community and Economic Development and was formerly assigned to the Melrose neighborhood target area. The role of OCED in Melrose and throughout Metropolitan Dade County is to formulate and implement plans for channeling federal Community Development Block Grant bonds into community development programs. Citizen participation is a requirement

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[1]OCED is the Office of Community and Economic Development, the governmental entity for which Morales worked and to which the Board gives advice.

for use of these federal funds. The Melrose Community Advisory Board (hereinafter "Board") is the Melrose neighborhood's volunteer citizen group on community development issues. Defendant-appellant Raymundo Barrios serves as its elected chairman. Community groups like the Melrose Board are independent of OCED authority, but work closely with OCED in setting and implementing community development goals.

Morales' job as the principal planner for Melrose was to ensure citizen participation through communication with and input from the Board, and to act as liaison between the OCED office and the Board. At two such meetings, Morales made the statements he later asserted were the basis for his reassignment out of the Melrose target area.

On June 19, 1985, Morales and two (out of a total fifteen) Board members attended a meeting of the Board to consider a commercial revitalization program. Barrios presided over the meeting as chairman. Immediately following the meeting, the two attending Board members informed Morales that Barrios had telephoned Board members to cancel the meeting and to tell them to stay away from the meeting. Attributing the poor attendance to Barrios' action, Morales angrily called Barrios a "saboteur," a "hypocrite," and a "Machiavellian politician" who "used the community." Barrios, enraged, replied that Morales should "start looking for another job." At Morales' request, the director of OCED, Dr. Ernest Martin, arranged a June 27 meeting between Morales, Martin, and Barrios to encourage future cooperation on the common goal of community development.

Morales and Barrios had a second confrontation at a meeting of the Board on September 17, 1985. The Board questioned a delay in the start of Melrose's garbage clean-up campaign. It had received no reply to a letter Barrios and Board Secretary Mario Delgado had written to OCED Director Ernest Martin to request OCED's assistance in funding the campaign. Morales stated that the letter needed to have been sent timely to OCED, and that Barrios had failed to do so. A

heated exchange ensued, in which Barrios declared Morales' remark untrue. Morales replied that he was not lying, and that, "The one who is lying is you." Morales proceeded to answer questions from Board Secretary Delgado about the letter. The meeting then continued through other agenda items with no further disruption.

On September 25, 1985, Barrios and Board Secretary Delgado prepared a petition to OCED requesting Morales' transfer out of the Melrose target area, citing Morales' statements to the Board at the September 17 meeting and the Board's inability to communicate with Morales. Twelve of the fifteen committee members and a Melrose neighborhood resident signed the petition. Barrios and Delgado explained the petition, which was in English, to several Board members who spoke no English.

Morales responded with an October 2 memorandum to OCED Director Ernest Martin. The memorandum briefly described his dispute with Barrios at the September 17 meeting, labelling Barrios' version of the exchange a distortion of the truth. Morales also stated that Barrios was known for using disruptive tactics, lying, and distorting the facts. He alleged that Barrios' behavior was part of a personal vendetta which Barrios began against him in 1982, after Morales refused Barrios' requests for kickbacks and a political campaign contribution. At the close of the memorandum, Morales wrote, "I consider all this a very serious threat against my integrity, my professional reputation, and my job . . ."

Writing in response to the Board's September 25 petition for Morales' removal, County Manager Merritt Stierheim informed Barrios in a letter dated October 11, 1985, that another member of OCED's staff would be assigned to work with the Melrose Board " . . . to restore open channels of communication between the Office of Community and Economic Development and your community . . . ." At the close of this letter, Stierheim expressed his commitment to a "positive and effective working relationship with the residents of Melrose." OCED Director Martin later testified:

> [W]hat was said [at the September 17th Board meeting] . . . was not as relevant as the fact that we were not able to meet our obligations to the Federal Government and the community in getting progress in Melrose as a result of this kind of continued disruption . . .
>
> And based on all of those factors, I decided the wisest thing to do would be, as we have done before, is make a rotation of the employee, . . . and . . . assign new personnel that could get Melrose moving forward on the work program that the residents in the area and the County both agreed they wanted to be done.

Trial Transcript at 536.

On October 25, 1985, OCED reassigned Morales from Melrose to the Leisure City target area. The reassignment involved no loss of salary, responsibility or benefits for Morales.

Morales filed this action under 42 U.S.C. s. 1983 for reinstatement, damages, costs and fees, claiming the reassignment infringed upon his First Amendment right to freedom of speech.

The district court found as a matter of law that Morales' statements touched upon matters of public concern. It then submitted a special verdict form to the jury. The jury found that Morales' statements were a substantial motivating factor in the decision to reassign him, and that he would not have been reassigned in the absence of the statements. Based on the jury verdict and on the court's own finding that Morales' statements involved matters of public concern, the district court entered judgment for Morales. The district court also issued a permanent injunction reinstating Morales to his former position and enjoining his transfer out of the Melrose target area. The district court granted a stay of the judgment pending the outcome of this appeal.

II. DISCUSSION

[1] Morales argues that OCED reassigned him for engaging in constitutionally protected speech, in violation of his right to freedom of speech under the First Amendment. It is well settled that "a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). In order to prevail on his claim, Morales must show that his statements addressed a matter of public concern.[2] If the speech does not touch upon a matter of public concern, then the *Pickering*[3] balancing process is triggered. The determination of whether a public employer had properly discharged an employee for engaging in speech requires a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the state, as employer, in promoting the efficiency of the public services it performs. *Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 149-54, 103 S.Ct. 1684, 1691-94, 75 L.Ed.2d 708 (1983); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). We first address whether Morales' speech addressed a matter of public concern, and then turn to the *Pickering* balancing

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[2]Of course, in order to prevail Morales must also show that his statements were a substantial motivating factor in his reassignment. *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986). In this case, the jury found that Morales' statements were a motivating factor in his reassignment, and also that he would not have been reassigned in the absence of such statements. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The causation issue is a factual one, *Waters v. Chaffin*, 684 F.2d 833, 837 n. 10 (11th Cir.1982), and these jury findings are amply supported by the evidence. Thus, in the text, we discuss only two issues – whether the speech addressed a matter of public concern, and if it did, whether the *Pickering* balance tilts in favor of Morales' speech interest or OCED's interest in the orderly administration of its governmental office.

[3]*Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

process.[4] Both issues are questions of law with respect to which the court is required to examine for itself the statements at issue and the circumstances under which they are made to determine whether or not there is First Amendment protection. *Rankin v. McPherson, supra; Connick v. Myers,* 461 U.S. at 148 n. 7, 150 n. 10, 103 S.Ct. at 1690 n. 7, 1692 n. 10.

A. *Speech Addressed Public Concern*

[2] The threshold question of whether Morales' statements constituted speech on a matter of public concern "must be determined by the content, form and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48, 103 S.Ct. at 1690. In determining whether Morales' statements were constitutionally protected, the district court stated without explanation that those statements touched upon a matter of public concern.

The parties stipulated that the garbage clean-up campaign for Melrose neighborhood and OCED's failure to implement it are matters of public concern. We agree, and we conclude that Morales' statement at the September 17 Melrose Board meeting addressed that public concern. Morales' statement, "The one who is lying is you," came after Barrios denied Morales' explanation that Barrios' own lack of diligence, rather than any neglect on the part of OCED could have delayed the clean-up campaign. While "the actual words [Morales] spoke cannot be said to be valuable to the public at large, the first amendment's protections do not turn on the social worth of the statements ....", *Waters v. Chaffin,* 684 F.2d 833 (11th Cir.1982)(citations omitted). In context -- i.e., an attempt to defend OCED's efforts with respect to the clean-up

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[4]The law is clear that Morales bears the burden of proving that his speech addresses a matter of public concern. *Ferrara,* 781 F.2d at 1514. If that burden is carried, it is also clear that in the balancing process the governmental employer bears the burden of justifying the discharge. *Rankin,* __ U.S. at __, 107 S.Ct. at 2898. In this case, our resolution of each of the two issues is indicated by a substantial margin, and thus the burden of proof does not affect our decision.

campaign against Barrios' public criticism -- Morales' speech did relate to matters of public concern.

Morales' statements after the June 19 meeting and in his October 2 memorandum to OCED Director Martin also addressed matters of public concern. The statements conveyed Morales' assessment of Barrios' service to the goal of community development in Melrose. *See Connick*, 461 U.S. at 148, 103 S.Ct. at 1690-91. In making these accusations, Morales was clearly concerned with bringing to light an "actual or potential wrongdoing or breach of public trust ..." by Barrios. *Id.* Morales pointed to Barrios' attempted cancellation of the June 19 meeting and his behavior at the September 17 meeting as evidence of Barrios' lack of cooperation with OCED. These statements sought to inform OCED or other members of the Board that by disrupting the community development process, Barrios was not discharging his responsibilities as Chairman to the Melrose Board. These charges constituted an evaluation of Barrios' performance in his public service, and thus touched upon matters of public concern. *Id.*

Obviously, the references to the October 2 memorandum to Barrios' attempts to obtain kickbacks and political contributions relate to matters of public concern.

B. *Balancing*

Having concluded that Morales' statements did touch upon matters of public concern, next we must evaluate the circumstances under which Morales' constitutionally protected speech prompted OCED's employment decision. *Pickering* sets out the analysis of controlling interests where First Amendment claims conflict with the need for orderly public administration. *Egger v. Phillips*, 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918, 104 S.Ct. 284, 78 L.Ed.2d 262 (1983), *quoting Pickering v. Board of Education*, 391 U.S. 569, 88 S.Ct. at 1735. We must consider several factors in balancing the State's interest in efficient provision of public services against Morales' speech interest, including: (1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the

manner, time and place of the speech, and (3) the context within which the speech was made. *Connick*, 461 U.S. at 151-55, 103 S.Ct. at 1692-94; *Ferrara*, 781 F.2d at 1513.

State interests weigh heavily where an employee's speech thwarts the mission of the agency or impedes the performance of the speaker's duties. Also, where an employee's speech has a detrimental impact on close working relationships or destroys harmony among coworkers, "a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52, 103 S.Ct. at 1692.

Morales' statements frustrated the pursuit of community development goals in Melrose by effectively cutting off communication between the Melrose Board and OCED. Although Morales was OCED's chief contact in Melrose, he could no longer communicate with his chief contact on the Board, Chairman Barrios. Despite having committed himself to renewed efforts at cooperation with Barrios (at the meeting of June 27), Morales expressed his continued mistrust in Barrios both at the September 17 meeting and in his memorandum of October 2. Morales' statements aggravated existing mistrust between Morales and Barrios.

Morales' statements thwarted OCED's mission in Melrose by ending his effectiveness as the liaison between OCED and the Board. OCED Director Martin testified that these "disruptions" interfered with the community development process in Melrose. Morales' statements indicated that he could no longer adequately represent and protect OCED's position in Melrose.

Morales' statements at the June 19 and September 17 meetings shifted focus from the topics of the meetings, community revitalization and the clean-up campaign, respectively, to the personal animosity between Morales and Barrios. The most damaging effect of Morales' statements on the governmental interest was the destruction of the necessarily close working relationship between Barrios and Morales. The chief contact between OCED and the Melrose Board consisted

of conferences between Morales and Barrios to establish an agenda for Melrose Board meetings. Morales' statements at the June 19 and September 17 meetings were couched in terms certain to alienate the Board's chairman, Barrios. In light of Morales' admission that a difficult working relationship between himself and Barrios predated the June 19 meeting, the tenor of his criticisms could only have aggravated any existing tension between himself and Barrios. Since Morales' duties as principal planner for Melrose required that he maintain a regular relationship with Barrios, the effect of his statements was to bring the community development process in Melrose to a virtual halt.

The time, place and manner in which Morales' remarks were uttered further contributed to the disruption of community development process. While Morales' poor choice of words in criticizing Barrios might be less significant in a private context,[5] when spoken at the public meetings of the Board these remarks impeded OCED's interests in Melrose. In context, these remarks could not be seen merely as Morales' personal opinion as an individual citizen. The danger was that OCED would be discredited by Morales' outbursts, in the eyes of the Board and the public. Other Board members and members of the Melrose community at large were present at a meeting in which a principal planner accused the target area Chairman of lying. Board members and at least on member of the community at large were present at a meeting in which an OCED principal planner called the Chairman a "Machiavellian politician." In exercising his right to engage in speech, Morales

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[5]*Cf. Rankin, supra; Waters v. Chaffin,* 684 F.2d 833, 839 (11th Cir.1982) ("Absent significant countervailing governmental interests, we are loathe to sanction the intrusion of the government's ear into the private lives of its employees.") Waters was a police captain who made comments critical of a superior officer in a private conversation with another officer while both were off-duty. Emphasizing the private context of the conversation, the court found that under the particular circumstances of the case, Waters' statement that his superior officer was "as sorry as they come and nothing but a back stabbing son of a bitch," was an unconstitutional basis for his dismissal on grounds of insubordination.

risked associating OCED with statements bound to strain relations with the Board.

The context in which Morales' remarks were made is also relevant in weighing his speech interests against the interest of OCED. Speech critical of office policy or personnel may warrant greater First Amendment protection where it is based solely on an interest in improving the performance of the office. *See Connick*, 461 U.S. at 153, 103 S.Ct. at 1693. On the other hand, where an employee's speech arises out of his own ongoing personnel dispute, "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Id.* at 153, 103 S.Ct. at 1693. Morales' remarks were not triggered by the transfer itself, and thus did not arise out of the employment dispute. Although this context of the remarks does not indicate that any additional deference should be given to the employer's decision, the considerations discussed above nevertheless tilt the *Pickering* balance in favor of OCED. Morales' speech impeded OCED in fulfilling its responsibilities in Melrose, and undermined Morales' effectiveness in his job. The necessarily close working relationship between Morales and Barrios was destroyed. Moreover, the time, place and manner in which Morales made the offending statements further contributed to the loss of effectiveness in Melrose.

This case, like all cases involving the *Pickering* balance, turns upon the particular facts and circumstances. We conclude here that Morales' statements so severely impeded his own effectiveness and the effectiveness of OCED in the Melrose area that the governmental interest at stake in this case clearly outweighs Morales' speech interest.

III. CONCLUSION

Although we conclude that Morales' speech did address matters of public concern, we conclude that the *Pickering* balance tilts clearly in favor of OCED's governmental interests.

Accordingly, we reverse and remand for entry of judgment in favor of OCED.[6]

REVERSED and REMANDED.

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[6]In light of our decision, it is obvious that the district court's award of attorney's fees to Morales cannot stand, and it is accordingly vacated. OCED's arguments on appeal concerning the amount of attorney's fees are moot.

(2)

No. 88-939

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

RUSSELL LEON, as Personal Representative of the Estate of JORGE MORALES,

Petitioner,

vs.

JOAQUIN AVINO, as County Manager of Metropolitan Dade County, Florida, and RAYMUNDO BARRIOS, individually and as chairman of the Melrose Community Development Advisory Board,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 7, 1988 and reported as *Morales v. Stierheim*, 848 F.2d 1145 (11th Cir. 1988).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action was filed by the Petitioner's decedent, Jorge Morales, against Merrett Stierheim and Raymundo Barrios in the United States District Court for the Southern District of Florida in November, 1985.[1]

Jorge Morales was employed by the Office of Community and Economic Development of Metropolitan Dade County, Florida ("OCED"). Morales was employed as principal planner for the Melrose Community Development Advisory Board, a group of citizen volunteers representing the Melrose neighborhood in Dade County, Florida (the "Melrose Board" or the "Board"). The Board's function is to determine the needs of the Melrose neighborhood, so that OCED can implement Dade County's federally funded community development plan for that neighborhood. Citizen participation is required for the use of these federal funds. The Melrose Board is not an agency of Metropolitan Dade County and has no control over OCED's personnel decisions. As a principal planner, Morales assisted the Board in identifying and

[1] Merrett Stierheim, the Dade County Manager at all times pertinent to this action, was sued in his official capacity. All claims against Stierheim individually were dismissed during the trial. Joaquin Avino succeeded Stierheim as Dade County Manager and was substituted as a party by order of the trial court.

prioritizing the needs of the neighborhood and in formulating plans for implementation of community development plans in the Melrose area. Morales was OCED's sole representative for the Board. Morales' role as principal planner required close work with the Chairman on agenda preparation, coordination of the Board meetings and the flow of information between the Melrose Community and the OCED. R.6-529. Raymundo Barrios is an elected member of the Melrose Board and was appointed as Chairman of the Board by his fellow members.

On October 25, 1985, OCED reassigned Morales from his position of principal planner to Melrose to principal planner for another neighborhood. This reassignment involved no loss of salary, job benefits or responsibility. Dr. Ernest Martin, Morales' supervisor, testified that he made the reassignment because the continuing disruptions and conflicts between Morales and Barrios impeded the community development process in Melrose. R.6-499. At trial Morales confirmed that his conflicts with Barrios interfered with the community development process in Melrose. R.6-494.

During one such conflict on June 25, 1985, Morales publicly called Barrios a "saboteur", "hypocrite" and "Machiavellian politician". Dr. Martin met with Barrios and Morales after this incident. Both agreed to try to cooperate.

On September 17, 1985 at a public meeting of the Board, Morales called Board members "liars" and "distorters of the truth" during a discussion of the reasons

behind the delay in the start-up of a community-requested garbage clean-up campaign. R.7-605.

Barrios and Melrose Board Secretary, Mario Delgado, disturbed by the occurrence at the September 17th meeting met and prepared a petition for signature by the other Board members. Twelve of the thirteen Board members and one member of the Melrose community met and signed the petition, because they felt something had to be done to maintain contact between the Board and OCED. R.4-160. The petition requested Morales' reassignment based on his "improper words and disrespectful statements" and the Board's inability to communicate with him.

In a memorandum dated October 2, 1985, Morales responded to the Board's petition by stating *inter alia* "I believe we all know how Mr. Barrios uses his disruptive tactics and how he lies and distorts the facts." R.1-4-16. Morales also alleged that Barrios had in the past sought "kickbacks" and campaign contributions from him. R.1-4-16. Morales reported his allegations of Barrios' alleged malfeasance to the Dade County State Attorney's Office, which did not initiate a criminal investigation. R.6-539. Barrios was unaware Morales had accused him of corruption until the trial of this matter.

Morales filed suit in the United States District Court for the Southern District of Florida claiming that his reassignment from the Melrose Board violated his first amendment rights. The case was tried to a jury, and the trial court entered a final judgment based on the jury verdict awarding Morales $20,000 in compensatory damages against Barrios and OCED and $5,000 in punitive

damages against Barrios. The court also permanently enjoined OCED from reassigning Morales in violation of his first amendment rights. The trial court awarded Morales attorney fees of $49,687.50 pursuant to 42 U.S.C. § 1988. The court stayed the final judgment for damages and permanent injunctive relief pending the outcome of the Defendants' appeal to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals reversed the judgment of the trial court and award of attorney fees and ordered judgment entered in favor of OCED and Barrios. The Eleventh Circuit found that Morales' speech addressed issues of public concern and upheld the jury's finding that the statements at issue were a substantial motivating factor in Morales' reassignment. 848 F.2d 1145, 1148 n.2. The appeals court reversed the trial court's judgment, however, because its application of the *Pickering* balancing factors indicated by a substantial margin that OCED's interest in efficient government administration outweighed Morales' interest in making the statements at issue. *Id.* at 1148 n.4. Morales filed a motion for rehearing which was denied on September 6, 1988. On December 5, 1988 the Petitioner filed his petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

Reasons For Denying Certiorari

According to the opinion of this Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d

811 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), it is not a violation of the first amendment for the government to reassign its employee, Jorge Morales, in the interest of efficient operation of government activity, after the employee verbally attacks a person with whom he is required to work closely.

The Eleventh Circuit's independent review of the evidence in this case to determine if the first amendment was violated is not a violation of the seventh amendment right to jury trial, when no jury findings were reexamined. The Eleventh Circuit reversed the court below on an issue of law. Even if jury findings were reexamined in making that determination, the Eleventh Circuit's review did not violate the seventh amendment. *Bose Corporation v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984).

ARGUMENT

I

In holding for OCED and Barrios, the Eleventh Circuit correctly balanced the government's interest in the efficiency of its programs against Morales' right as a government employee to verbally attack Barrios. A simple analysis of the opinion below shows that the Eleventh Circuit reviewed only the issues of whether Morales' statements touched a matter of public concern and whether such speech is protected under the first amendment. Both are questions of law, not fact. *Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7, 75 L.Ed.2d 708, 720 n.7. The question of whether the conduct

or speech at issue is constitutionally protected is a determination which must be made by examining the "content, form, and context of a given statement as revealed by the whole record." 103 S.Ct. at 1960.

As a preliminary step in analyzing a public employee's first amendment claim, the court must determine whether the employee's statement may be "fairly characterized as . . . speech on a matter of public concern." *Id.* at 461 U.S. 138, 143, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708, 713. Even where public employees are engaged in speech on a matter of public concern, their interest in engaging in such speech must be balanced against the public employer's undeniable, legitimate interests in promoting or maintaining efficiency in government administration. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The *Pickering* court described the balancing test as follows:

> In performing the balancing, the statement will not be considered in a vacuum; the manner, time and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

Id. at 568.

In the present case, the Eleventh Circuit correctly applied the *Pickering* factors to the facts of this case as found by the trial court. Mora es' statements seriously

impeded the community development process in Melrose, according to the testimony of OCED's Director Dr. Ernest Martin. 848 F.2d 1145, 1150 (11th Cir. 1988). Although Morales was OCED's liaison to the Melrose community and was required to consult with the Chairman to determine the agenda for the neighborhood meetings, he could no longer communicate with the Chairman and the members of the Melrose board. Morales also testified that his problems with Barrios interfered with the community development process. R.6-468. Because of the continuing disruption in relations between Morales and the Board and to keep the community in contact with the County, twelve of thirteen Melrose Board members and one member of the Melrose community met and signed a petition requesting Morales' reassignment as a result of his statements before the board R.4-160.

It is important to note in analyzing the time, place and manner of the speech at issue here that Morales called Barrios a "saboteur", a "hypocrite", and a "Machiavellian politician", a "distorter of the truth" and a "liar" in a public meeting. Such personal, intemperate remarks could only serve to further alienate Barrios and totally destroy the necessarily close working relationship between Barrios and Morales.

There is no basis for Petitioner's argument that Barrios infringed Morales' constitutionally protected rights by seeking his reassignment following Morales' statements in the public meeting of September 17, 1985. Nothing in the Constitution strips Barrios of the right as a citizen to complain about misconduct and insulting remarks from a public employee. *See Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 284 (1983).

Reproach from those against whom one inveighs is a natural cost of an intemperate verbal attack. *See Id.* at 322-23.

II.

Petitioner argues the Eleventh Circuit rejected the findings of the jury in violation of the Seventh Amendment to the United States Constitution in performing the *Pickering* balancing test and concluding that OCED's interest in efficient administration of its programs outweighed Morales' first amendment rights. Although the petition is not specific as to the facts allegedly rejected, it seems to indicate that by reversing the award of punitive damages, the Eleventh Circuit found Morales more blameworthy than Barrios for causing the verbal melee during which Morales made the statements at issue. Pet. 6-7. The petition also suggests that in holding the *Pickering* balance weighed heavily in the government's favor, the Eleventh Circuit reversed a nonexistent jury finding that the actual reason for Morales' reassignment was Barrios' alleged threat that "Morales should start looking for a new job".

Soundly established federal constitutional law holds that appellate courts must exercise independent constitutional judgment on the facts of the first amendment case under review. *Connick v. Myers,* 103 S.Ct. 1684, 1691 n.10. First amendment cases address such important rights that *de novo* review is compelled. *Bose Corporation v. Consumers Union of U.S. Inc.,* 466 U.S. 485, 508 n.27, 80 L.Ed.2d

502, 522 n.27, 104 S.Ct. 949, 972 n.27 (1984).[2] Reexamination of facts tried to a jury does not violate the Seventh Amendment "where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *Bose* quoting *Fiske v. Kansas*, 274 U.S. at 385-386, 71 L.Ed. 1108, 47 S.Ct. 655 (1927). In *Bose*, this Court reversed a trial court's finding that a magazine publisher had defamed a public official with "actual malice", when the author of an article in the magazine wrote an inaccurate description of what he had perceived and insisted that he was not mistaken in his statement. *Id.* at 524.

Whether the Eleventh Circuit could have reversed the jury's findings in this case is an academic issue. No jury findings were reversed. The jury did not find that Morales was transferred because of Barrios' alleged threats. Assuming arguendo that Barrios threatened Morales, there is no evidence that Morales' reassignment resulted from that threat. To the contrary, the evidence

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[2] Petitioner incorrectly claims that *Bose* does not require a *de novo* review of the evidence in the exercise of its independent constitutional judgment. Pet. 7. The portion of *Bose* on which the Petitioner relies merely establishes that the reviewing court in *Bose* did not need to review the entire record to determine, if the defendant magazine publisher acted with malice in publishing a review of Plaintiff's speakers. *Bose*, 466 U.S. 485, 514 n.21b. Only facts pertinent to the "malice" issue should be accorded *de novo* review. Any review of facts in the record which were irrelevant to the issue of "malice" must be performed in accordance with Fed.R.Civ.P. 52(a) which accords facts found by a jury with deference, such that these facts can only be overturned when they are clearly erroneous. *Id.*

supports the Eleventh Circuit's holding that the close working relationship between Barrios and Morales had been destroyed to the detriment of the community development program. *Id.* at 1150.

In reversing the award of punitive damages, the Eleventh Circuit blamed neither Morales nor Barrios for causing the hostile atmosphere in which Morales' vituperative remarks were uttered. The court's opinion merely states the obvious: no damages, either compensatory or punitive, can be awarded upon a finding that no first amendment violation occurred. Petitioner's insistence on inserting the irrelevant issue of fault is an injudicious use of this Court's time and an attempt to make a "federal case" out of a personnel problem. *See Bishop v. Woods*, 426 U.S. 341, 350, 96 S.Ct. 2074, 2080, 48 L.Ed.2d 684, 693 (1976). The Eleventh Circuit reached no factual conclusions contrary to those of the jury. The court assumed the truthfulness of Morales' version of the facts, but reached a different legal conclusion than the trial court. However, even if contrary factual findings were made by the reviewing court, *Bose* allows the reexamination of these facts when relevant to the determination of first amendment issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

In reproducing *Morales v. Stierheim*, 848 F.2d 1145 (11th Cir. 1988), which is attached to the Petition for Writ of Certiorari as Appendix A, Petitioner omitted portions of the first paragraph of the "Discussion" section. The entire paragraph is reproduced below with the omitted portions underscored:

II. DISCUSSION

[1] Morales argues that OCED reassigned him for engaging in constitutionally protected speech, in violation of his right to freedom of speech under the First Amendment. It is well settled that "a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). In order to prevail on his claim, Morales must show that his statements addressed a matter of public concern.[2] If the speech does not touch upon a matter of public concern, then the court may not ordinarily scrutinize OCED's decision to reassign Morales. *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). If the speech at issue does involve a matter of public concern, then the *Pickering*[3] balancing process is triggered. The determination of whether a public employer had properly discharged an employee for engaging in speech requires a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the

interest of the state, as employer, in promoting the efficiency of the public services it performs. *Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 149-54, 103 S.Ct. 1684, 1691-94, 75 L.Ed.2d 708 (1983); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). We first address whether Morales' speech addressed a matter of public concern, and then turn to the *Pickering* balancing process.[4] Both issues are questions of law with respect to which the court is required to examine for itself the statements at issue and the circumstances under which they are made to determine whether or not there is First Amendment protection. *Rankin v. McPherson, supra; Connick v. Myers*, 461 U.S. at 148 n. 7, 150 n. 10, 103 S.Ct. at 1690 n. 7, 1692 n. 10.

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[2] Of course, in order to prevail Morales must also show that his statements were a substantial motivating factor in his reassignment. *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). In this case, the jury found that Morales' statements were a motivating factor in his reassignment, and also that he would not have been reassigned in the absence of such statements. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The causation issue is a factual one, *Waters v. Chaffin*, 684 F.2d 833, 837 n. 10 (11th Cir.1982), and these jury findings are amply supported by the evidence. Thus, in the text, we discuss only two issues – whether the speech addressed a matter of public concern, and if it did, whether the *Pickering* balance tilts in favor of Morales' speech interest or OCED's interest in the orderly administration of its governmental office.

[3] *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[4] The law is clear that Morales bears the burden of proving that his speech addresses a matter of public concern.

Ferrara, 781 F.2d at 1514. If that burden is carried, it is also clear that in the balancing process the governmental employer bears the burden of justifying the discharge. *Rankin,* ___ U.S. at ___, 107 S.Ct. at 2898. In this case, our resolution of each of the two issues is indicated by a substantial margin, and thus the burden of proof does not affect our decision.